STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 28, 2014
v	No. 310297 Calhoun Circuit Court
JEFFERY JOHN HARINCK, Defendant-Appellant.	LC No. 2011-000393-FH

Before: SAWYER, P.J., and BECKERING and SHAPIRO, JJ.

PER CURIAM.

Defendant, Jeffery John Harinck, was charged with one count of first-degree home invasion, MCL 750.110a(2); two counts of felonious assault, MCL 750.82; and three counts of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. After a jury trial, defendant was convicted of one count of felonious assault and one count of felony-firearm and acquitted of the remaining charges. The trial court sentenced defendant to two years' imprisonment for his felony-firearm conviction and to fines and costs for his felonious-assault conviction. He appeals as of right. We affirm.

I. BASIC FACTS AND PROCEDURAL HISTORY

The prosecution produced evidence at trial that on the evening of November 20, 2010, defendant's wife, Kelley Jean Harinck, told her husband that she planned to go out with friends after work. Instead, she drove to Richard Lavern Start's house. Start was a coworker of hers with whom she had developed a romantic relationship. Defendant, who had grown suspicious of his wife's activities, followed her to Start's house. Approximately 15 to 30 minutes after she arrived, Harinck went upstairs with Start to his bedroom, where they turned off the lights and engaged in sexual intercourse. Defendant then entered the residence without knocking and without permission.

Harinck and Start testified to slightly different versions of the events that took place after defendant entered the residence. According to Harinck, while she and Start were engaged in sexual intercourse, she heard defendant say her name. She looked up and saw him standing in the doorway with a gun and a flashlight. Defendant held a .45 caliber handgun in his left hand and pointed it at her and Start. Harinck pushed Start in order to move him out of the way of the gun, got off the bed, and "crouched down on the floor." Someone turned on the bedroom light. Start began to wrestle with defendant for the gun and the gun "went off." After the gun fired,

Start and defendant continued to wrestle; Start grabbed the .45 caliber handgun from defendant and put the gun on the bed. Defendant then removed a second gun, a "Derringer," from his right jacket pocket and pointed it at Start. Defendant and Start wrestled with the Derringer and the Derringer fired. Harinck did not see where either shot went, as she remained crouched down on the floor. She eventually rose off the floor, moved to the edge of the bed, and defendant struck her in the face, knocking her unconscious. When she awoke, defendant had both guns back in his possession and told her to "get [her] clothes on and get downstairs and get in the van." She dressed and went downstairs but drove herself home.

According to Start, he and Harinck "fell into a romantic interlude" and were lying on his bed in the dark. Suddenly, the lights in the bedroom came on, and he saw defendant standing in the bedroom door holding a flashlight and a .45 caliber handgun. Defendant pointed the gun at him and had a brief conversation with Harinck. Start could not recall any details of the conversation but testified that it alerted him to the fact that defendant was Harinck's husband. Start testified that Harinck called out defendant's name, rose, and grabbed defendant's sleeve and elbow. Start decided that this provided him with a "good" opportunity to disarm defendant, so he got up from the bed and attempted to get defendant's gun. Start heard the .45 caliber handgun fire once, into the mattress, and saw Harinck and defendant fall over to the side of the bed toward the bedroom wall. Defendant attempted to stand up, and Start grabbed the gun from defendant's left hand. Defendant then removed a Derringer from his pocket. Start grabbed defendant's arm and "hit" it against the bedroom dresser. The Derringer fired into the bedroom wall. Start "smacked" at defendant's wrist, took the Derringer, went to the corner of the room, and unloaded the ammunition from both weapons. Harinck stood up, and defendant "slapped her full across the face and down she went again." Defendant asked for his guns back. Start returned the guns but kept the ammunition. Harinck rose, dressed, and left with defendant. Start noticed that defendant's hand was bleeding after the incident.

According to defendant, who testified at trial, he had grown concerned about his wife because he believed that she was abusing drugs. He followed Harinck from her workplace to Start's home, parked his car, and waited for several minutes. He then approached the residence and heard noises from inside. Believing that his wife could be at a drug dealer's house and that he was raping her, defendant knocked on the door. When no one responded, he let himself inside. Once inside, defendant "followed the noise" upstairs and saw Harinck and Start engaged in sexual intercourse. Believing that Start was sexually assaulting Harinck, he yelled, "Get the hell off her." Start jumped up quickly, so defendant drew his .45 caliber handgun and turned on the light. Start asked him who he was, and he replied that he was Harinck's husband. At that point, defendant started to put his gun away, but Start "jumped" on him. Defendant's gun fired twice and then Start gained possession of the gun. Start pointed the gun under defendant's chin and pulled the trigger, but the gun misfired. Harinck then grabbed defendant's leg and began striking him in the leg and groin area. When Harinck began to strike him, defendant realized that the sexual intercourse was consensual. He drew his Derringer and began hitting Harinck in an attempt to remove her from his leg. Again, Start took the gun away from defendant and fired it at him. This time, the bullet struck his hand. Defendant testified that Start panicked after he shot defendant, unloaded the guns, returned the guns to defendant, and apologized. Harinck and Start dressed, and all three went downstairs together. Defendant did not know that Harinck was being unfaithful and believed that she was "stoned" that evening. Defendant testified that Start was the only person at whom he pointed a gun.

The jury found defendant guilty of one count of felonious assault and one count of felony-firearm arising out of his conduct involving Harinck, but it acquitted him of the remaining charges of first-degree home invasion and felonious assault and felony-firearm pertaining to Start and the entry into his home.

II. INCONSISTENT VERDICTS

Defendant first argues that the jury verdicts were inconsistent and violated his due-process rights where the jury convicted him of crimes involving Harinck but acquitted him of crimes involving Start, despite the fact that the two complainants were in bed together when the incident happened. Defendant concedes that current caselaw provides that criminal jury verdicts may be inconsistent but suggests that we should end this practice as a matter of "law reform."

First, we disagree with defendant's assertion that the verdicts were inconsistent. Defendant argued at trial that he entered the residence on the belief that Harinck was being sexually assaulted, and the trial court instructed the jury with regard to the lawful defense of others. Therefore, the jury may have concluded that defendant acted in lawful defense of Harinck, even though he was mistaken about her being in danger, which justified entering the residence without permission and pointing the gun at Start, but did not justify also pointing the gun at or threatening his wife. Thus, the jury verdicts are not inconsistent.

Moreover, even assuming the verdicts are inconsistent, it is well established that consistency in jury verdicts is not required under Michigan law. *People v Vaughn*, 409 Mich 463, 465-466; 295 NW2d 354 (1980) (involving conviction of felonious assault but acquittal of felony-firearm). Each count of a multi-count indictment is regarded by the jury as a separate indictment, *id*. at 465, and a jury "may reach *different* conclusions concerning an *identical* element of two different offenses," *People v Goss (After Remand)*, 446 Mich 587, 597; 521 NW2d 312 (1994) (emphases in original). Furthermore,

> [j]uries are not held to any rules of logic nor are they required to explain their decisions. The ability to convict or acquit another individual of a crime is a grave responsibility and an awesome power. An element of this power is the jury's capacity for leniency. Since we are unable to know just how the jury reached their conclusion, whether the result of compassion or compromise, it is unrealistic to believe that a jury would intend that an acquittal on one count and conviction on another would serve as the reason for defendant's release. . . . [W]e feel that the mercy-dispensing power of the jury may serve to release a defendant from some of the consequences of his act without absolving him of all responsibility. [*Vaughn*, 409 Mich at 466.]

Thus, when a jury chooses not to convict because it exercised its capacity for leniency, a defendant "has no cause for complaint." *People v Lewis*, 415 Mich 443, 453; 330 NW2d 16 (1982). Accordingly, any inconsistency in the verdicts does not affect the validity of defendant's convictions. See *id.*; see also *Vaughn*, 409 Mich at 465-466; *People v Russell*, 297 Mich App 707, 722-723; 825 NW2d 623 (2012). Defendant's argument is without merit. Moreover, we decline defendant's invitation to "reform" the law. We are bound by Michigan Supreme Court precedent. *People v Beasley*, 239 Mich App 548, 556; 609 NW2d 581 (2000).

III. DUE PROCESS

Next, defendant argues that the trial court violated his due-process rights by permitting jurors to ask questions of witnesses during the trial. Because defendant did not object when the trial court permitted the jurors to submit questions for witnesses, this issue is not preserved. See *People v Cameron*, 291 Mich App 599, 617; 806 NW2d 371 (2011). Accordingly, our review is limited to plain error affecting defendant's substantial rights. See *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). MCR 2.513(I) provides that the trial court

> may permit the jurors to ask questions of witnesses. If the court permits jurors to ask questions, it must employ a procedure that ensures that such questions are addressed to the witnesses by the court itself, that inappropriate questions are not asked, and that the parties have an opportunity outside the hearing of the jury to object to the questions. The court shall inform the jurors of the procedures to be followed for submitting questions to witnesses.

Additionally, in *People v Heard*, 388 Mich 182, 187-188; 200 NW2d 73 (1972), our Supreme Court held that trial courts, in their discretion, may allow jurors to ask questions of witnesses. Therefore, Michigan court rules and caselaw clearly provide that a trial court may allow jurors to ask questions of witnesses during a trial. *Id.*; MCR 2.513(I).

Defendant argues that the questions demonstrated that the "jury was actively involved in seeking out facts, filling in any perceived gaps in the prosecutor's proofs, and deliberating before the conclusion of the case." However, under *Heard*, 388 Mich at 187-188, the purpose of allowing jurors to ask questions is to "help unravel otherwise confusing testimony" and to "aid the fact-finding process." Further, the trial court instructed the jury that "the only permitted time for you to discuss this case is during deliberations." "It is well established that jurors are presumed to follow their instructions." *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Moreover, there is no evidence of record that the jurors began deliberating in this case before the close of the trial; thus, defendant failed to meet his burden to furnish a record to verify the factual basis for his argument that the jury deliberated before the conclusion of the case. *People v Elston*, 462 Mich 751, 762; 614 NW2d 595 (2000) (citation omitted). On the record before us, defendant has failed to show plain error with regard to the juror questions. See, generally, *Carines*, 460 Mich at 763-764.

Defendant also argues that "as a matter of law reform," this Court should stop the practice of allowing jurors to ask questions. In support of this proposition, defendant relies on *State v Costello*, 646 NW2d 204, 213-215 (Minn, 2002). However, *Heard*, 388 Mich at 187-188, expressly permits trial courts to allow juror questions. "As long as case law established by our Supreme Court remains valid, this Court and all lower courts are bound by that authority." *People v Tierney*, 266 Mich App 687, 713; 703 NW2d 204 (2005) (quotation omitted).

IV. CRIME VICTIM'S RIGHTS ACT ASSESSMENT

Finally, defendant argues that the trial court violated federal and state ex post facto clauses by ordering him to pay $130 under the Crime Victim's Rights Act (CVRA), MCL

780.751 *et seq*. We review defendant's unpreserved ex post facto challenge for plain error. See *People v Earl*, 297 Mich App 104, 111; 822 NW2d 271 (2012).

> The ex post facto clauses of both the state and federal constitutions prohibit inflicting a greater punishment for a crime than that provided for when the crime was committed. A statute violates ex post facto principles if it (1) makes punishable that which was not, (2) makes an act a more serious criminal offense, (3) increases the punishment, or (4) allows the prosecution to convict on less evidence. [*Id.* (citations and quotation omitted).]

Defendant committed the offenses on November 20, 2010. At that time, MCL 780.905(1)(a) required the trial court to assess a $60 fee to convicted felons under the CVRA. See MCL 780.905(1)(a) as amended by 2005 PA 315. MCL 780.905(1)(a) was subsequently amended by 2010 PA 281 to increase the CVRA assessment to $130. The amendment took effect on December 16, 2010. 2010 PA 281; see also *Earl*, 297 Mich App at 111-112. At defendant's sentencing on January 3, 2012, the trial court ordered defendant to pay a CVRA assessment of $130. Defendant asserts on appeal that this violated the Ex Post Facto Clause. However, we have already considered this issue and held to the contrary. In *Earl*, 297 Mich App at 113-114, this Court ruled that "an assessment under the CVRA is neither restitution nor punishment," the CVRA does not "affect matters of substance," and "[o]ur Constitution has specifically authorized the Legislature to provide for an assessment against convicted defendants for the benefit of victims of crime. Accordingly, the trial court's order that defendant pay $130 under the CVRA is not a violation of the ex post facto constitutional clauses." We are bound to follow the rule of law articulated in *Earl*. See MCR 7.215(J)(1).[1]

Affirmed.

/s/ David H. Sawyer
/s/ Jane M. Beckering
/s/ Douglas B. Shapiro

[1] We note that the Michigan Supreme Court has granted leave to appeal in *Earl* to address "whether the imposition of the increased Crime Victim's Rights Fund fee violated the defendant's rights under the Ex Post Facto Clauses, US Const, art I, § 10, and Const 1963, art 1, § 10." *People v Earl*, 493 Mich 945; 828 NW2d 359 (2013). Unless our Supreme Court overturns *Earl*, we are bound by the decision.